

No. 86-1070

8

Supreme Court, U.S.  
**FILED**  
**MAR 5 1987**  
JOSEPH F. SPANIO, JR.

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

---

MOUNTAIN STATES LEGAL FOUNDATION, INC., ET AL.,  
PETITIONERS

v.

DONALD P. HODEL, ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

CHARLES FRIED  
*Solicitor General*

F. HENRY HABICHT II  
*Assistant Attorney General*

PETER R. STEENLAND, JR.

DONALD A. CARR

RAYMOND B. LUDWISZEWSKI  
*Attorneys*

*Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

---

12/87



### **QUESTION PRESENTED**

Whether the Bureau of Land Management's failure to remove wild horses from private land within a reasonable time, which is a violation of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 *et seq.*, is also an unconstitutional taking of private property when the horses consume forage located on private land.



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	1
Argument .....	4
Conclusion .....	8

## TABLE OF AUTHORITIES

### Cases:

<i>Agins v. City of Tiburon</i> , 447 U.S. 225 (1980) .....	3, 6
<i>Bishop v. United States</i> , 126 F. Supp. 449 (Ct. Cl. 1954), cert. denied, 349 U.S. 955 (1955) .....	5
<i>Douglas v. Seacoast Products, Inc.</i> , 431 U.S. 265 (1977) .	5
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979) .....	5
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979) .....	4
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982) .....	3, 4, 6
<i>PruneYard Shopping Center v. Robins</i> , 447 U.S. 74 (1980) .....	6, 7
<i>Sickman v. United States</i> , 184 F.2d 616, cert. denied, 341 U.S. 939 (1951) .....	5
<i>Stillwell v. Nation</i> , 363 P.2d 916 (Wyo. 1961) .....	7
<i>St. Louis v. Western Union Telegraph Co.</i> , 148 U.S. 92 (1893) .....	6
<i>United States v. Causby</i> , 328 U.S. 256 (1946) .....	4
<i>United States ex rel. Bergen v. Lawrence</i> , 620 F. Supp. 1414 (D. Wyo. 1985) .....	5
<i>United States v. Lovasco</i> , 431 U.S. 783 (1977) .....	8
<i>Webb's Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980) .....	7

### Constitution and statutes:

U.S. Const. Amend. V .....	3, 4, 6, 8
Commerce Clause .....	8
Property Clause .....	8
Bald and Golden Eagle Protection Act, 16 U.S.C. 668 <i>et seq.</i> .....	5

# IV

Statutes—Continue:	Page
Endangered Species Act, 16 U.S.C. 1531 <i>et seq.</i> . . . . .	5
Federal Courts Improvement Act of 1982, § 127(a), 28 U.S.C. 1295(a) . . . . .	3
Marine Mammal Protection Act, 16 U.S.C. 1361 <i>et seq.</i> . .	5
Migratory Bird Treaty Act, 16 U.S.C. 703 <i>et seq.</i> . . . .	5
Taylor Grazing Act, 43 U.S.C. 315 <i>et seq.</i> . . . . .	5
Unlawful Enclosures Act, 43 U.S.C. 1061 <i>et seq.</i> . . . .	5
Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 <i>et seq.</i> . . . . .	1, 2
§ 3(a), 16 U.S.C. 1333(a) . . . . .	2
§ 4, 16 U.S.C. 1334 . . . . .	2, 7
§ 8, 16 U.S.C. 1338 . . . . .	2
Pub. L. No. 97-164, § 403(e), 96 Stat. 58 . . . . .	3
Miscellaneous:	
S. Rep. 92-242, 92d Cong., 1st Sess. (1971) . . . . .	2, 6

# **In the Supreme Court of the United States**

OCTOBER TERM, 1986

---

No. 86-1070

MOUNTAIN STATES LEGAL FOUNDATION, INC., ET AL.,  
PETITIONERS

v.

DONALD P. HODEL, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## **OPINIONS BELOW**

The *en banc* opinion of the court of appeals (Pet. App. 1a-35a) is reported at 799 F.2d 1423. The panel opinion (Pet. App. 38a-54a), subsequently vacated, is reported at 740 F.2d 792. An earlier panel memorandum (Pet. App. 69a) is unreported. The orders issued by the district court (Pet. App. 55a-67a and 70a-73a) are unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on August 22, 1986. On November 7, 1986, Justice White extended the time for filing a petition for a writ of certiorari to and including December 22, 1986. The petition was filed on December 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## **STATEMENT**

1. In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act (the Act), 16 U.S.C. 1331 *et seq.*, to protect wild horses and burros from "capture, branding,

harassment, or death" (16 U.S.C. 1331). Congress found that these "living symbols of the historic and pioneer spirit of the West" had been cruelly slain, harassed, and killed both for sport and for the production of pet food and fertilizer and, as a result, their numbers had dramatically decreased from approximately two million early in this century to fewer than 10,000 in 1971. See S. Rep. 92-242, 92d Cong., 1st Sess. 1-2 (1971). Section 3(a) of the Act, 16 U.S.C. 1333(a), directs the Secretary of the Interior to manage the animals "at the minimal feasible level" and to "maintain a thriving \* \* \* ecological balance on the public lands." Section 4, 16 U.S.C. 1334, provides that a landowner may inform the nearest federal marshal or agent of the Secretary when protected animals stray onto private property and the Secretary "shall arrange to have the animals removed." Finally, Section 8, 16 U.S.C. 1338, subjects any person who "maliciously causes the death or harassment" of a wild horse or burro to criminal penalties.

2. Petitioner Rock Springs Grazing Association (Association) owns or leases approximately one million acres of high desert land in the alternating "checkerboard" sections of private and public holdings in Wyoming (Pet. App. 3a). In September 1979, petitioners filed a complaint that alleged, inter alia, that the Secretary had failed to remove horses from the Association's private property, in violation of Section 4 of the Wild-Free Roaming Horses and Burros Act, 16 U.S.C. 1334, and, as a result, the animals had eaten forage owned by the Association, in violation of the Fifth Amendment's prohibition on the taking of private property without just compensation. Petitioners requested a writ of mandamus requiring the Secretary to remove the horses from the Association's land and also sought ten dollars in "just compensation" from the United States for the taking of the forage (Pet. App. 3a).<sup>1</sup>

---

<sup>1</sup> Petitioners originally also sought \$500,000 in damages from the Director of BLM in his personal capacity, but they do not press that claim in this Court. See Pet. 7 & n.9.



3. The district court ordered the Secretary to remove the animals (Pet. App. 55a-58a) and, following the court of appeals' dismissal for lack of final judgment of appeals filed by both parties (*id.* at 68a-69a), the district court rejected petitioners' Fifth Amendment claim (*id.* at 59a-63a). The court ruled (*id.* at 61a-62a) that mandamus was a sufficient remedy to redress the BLM's violation of its statutory obligation to remove the horses from private lands and that Fifth Amendment notions of "justice and fairness" did not require that the Association be additionally awarded just compensation for its loss of forage.

4. The court of appeals initially reversed the district court's Fifth Amendment ruling in a panel opinion (see Pet. App. 38a-54a), but, sitting en banc, subsequently vacated that opinion and affirmed the district court's decision (*id.* at 1a-35a).<sup>2</sup> The court of appeals rejected petitioners' argument that the federal activities amounted to "a permanent physical government occupation of the Association's property" and therefore a taking under the rationale of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. App. 13a. Applying the takings analysis set forth in *Agins v. City of Tiburon*, 447 U.S. 225 (1980), the court concluded that no taking had occurred, since the federal restrictions on removal of the animals by landowners " 'substantially advance legitimate governmental interests' " and the loss of forage did not deprive the Association of all " 'economically viable use of [its] land' " (Pet. App. 16a-17a (quoting *Agins*, 447 U.S. at 260)). The court noted that petitioners were not clearly prevented by federal law from taking any action to remove

---

<sup>2</sup> The court of appeals had jurisdiction over the case, notwithstanding Section 127(a) of the Federal Courts Improvement Act of 1982, 28 U.S.C. 1295(a), because the notice of appeal from the district court's judgment was filed on April 14, 1982, which was prior to the effective date of the Act (October 1, 1982). See Pub. L. No. 97-164, § 403(e), 96 Stat. 58.

the animals or to prevent their entry; the federal Act prohibited only "malicious[]" harassment and killing (*id.* at 11a n.8).<sup>3</sup>

### ARGUMENT

The decision of the court of appeals is correct and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners claim (Pet. 11-14) that the Fifth Amendment requires that the United States award them "just compensation" (ten dollars) for economic burdens the Association suffered as a result of a federal restriction on the malicious harassment and killing of wild horses and burros that entered the Association's private property. Petitioners analogize the circumstances of this case to the military overflights of private property deemed a taking in *United States v. Causby*, 328 U.S. 256 (1946), and the public access requirements found to be a taking in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). They argue, moreover, that, as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which involved a municipal requirement that landlords allow the permanent physical occupation of their property by a transmission cable, the nature of the interference with the Association's property is enough, by itself, to establish a governmental taking within the meaning of the Fifth Amendment. The court of appeals correctly rejected petitioners' takings claim.

Simply put, an invasion of private property by a wild horse or burro is not the constitutional equivalent of a

<sup>3</sup> Judges Seth and Barrett each filed dissenting opinions (Pet. App. 19a-35a), which Chief Judge Holloway joined (*id.* at 35a). The dissenters concluded that BLM's control of the wild horses and burros supported a takings claim against the United States and the case should be remanded for further factual inquiry to determine whether petitioners could establish that the BLM was the cause of the animals' activities that led to the Association's losses (*ibid.*).

military overflight, a permanent physical occupation by a transmission cable, or public access. The United States does not own the wild horses or burros (see *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977); *Hughes v. Oklahoma*, 441 U.S. 322, 334-335 (1979)) and it does not authorize either their wanderings or their appetites. The federal Act, moreover, does not, as the court of appeals recognized (Pet. App. 11a n.8), bar nonmalicious efforts by private landowners to remove the animals or to prevent the animals from entering their property.<sup>4</sup> The Act merely prohibits a private landowner, such as the Association, from removing unwanted wild horses or burros from its private property by maliciously harassing or killing the animals. As the court of appeals pointed out (Pet. App. 9a-12a), the Act is like, therefore, a host of federal and state laws, including traditional fishing and hunting laws, that incidentally affect property rights by restricting private activities which adversely affect wildlife and that have been upheld in the face of similar challenges. See, e.g., Bald and Golden Eagle Protection Act, 16 U.S.C. 668 *et seq.*; Endangered Species Act, 16 U.S.C. 1531 *et seq.*; Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*; Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*; see also Pet. App. 13a (examples of state laws); *Bishop v. United States*, 126 F. Supp. 449, 452-453 (Ct. Cl. 1954), cert. denied, 349 U.S. 955 (1955) (crops lost to geese protected by Migratory Bird Treaty Act); *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), cert. denied, 341 U.S. 939 (1951) (same). Contrary to petitioners' claim, such a limited federal restriction does not "take" petitioner's "right to exclude others"—which is not equivalent to a

---

<sup>4</sup> Petitioners erroneously suggest (Pet. 13 n.14) that the Unlawful Enclosures Act, 43 U.S.C. 1061 *et seq.*, would prohibit fencing. The case upon which petitioners rely, however, makes clear that the Act does not prohibit fencing on private lands if it conforms to the standards for fencing on public lands established by the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* See *United States ex rel. Bergen v. Lawrence*, 620 F. Supp. 1414, 1418 (D. Wyo. 1985).

right to kill. Nor can petitioners credibly maintain that they possess a constitutionally protected right to kill or maliciously harass the animals.

In addition, in this case, unlike *Loretto*, there was no "permanent physical occupation" of private property (458 U.S. at 432, 441). The use of the range by the wild animals was at most a "temporary and shifting" use of private property (*id.* at 428-429, quoting *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893)). Hence, an unconstitutional taking cannot, in this case, unlike *Loretto*, be conclusively established solely by reference to the nature of the interference with petitioners' property. Instead, evaluation of petitioners' Fifth Amendment claim requires consideration of three overlapping factors previously identified by the Court as particularly significant in takings analysis in these circumstances: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

Consideration of these three factors fully supports the courts of appeals' analysis and its rejection of petitioners' Fifth Amendment claim. First, the purpose of the federal restriction is to protect from malicious harassment and killing wild animals that Congress deemed a "living symbol of the historic and pioneer spirit of the West" (S. Rep. 92-242, 92 Cong., 1st Sess. 1 (1971)). The Act is most akin therefore to a police power regulation that is simply "adjusting the benefits and burdens of economic life to promote the common good," which, as the court of appeals concluded, is a taking only if, unlike the federal action in this case, it " 'does not substantially advance legitimate state interests \* \* \* or denies an owner economically viable use of his land' " (Pet. App. 13a-19a (quoting *Agins v. City of Tiburon*, 447 U.S. at 260)). Second, petitioners cannot credibly maintain that they possess a "reasonable

investment-backed expectation" that they may maliciously harass or kill wild horses or burros, or that the federal government would allow the animal population to decrease to extinction. Indeed, petitioners readily admit (Pet. 12) that they have "[n]ever been able to stop this invasion" and therefore they are hard-pressed even to maintain that any shortfalls in the federal government's removal efforts have interfered at all with petitioners' settled expectations.<sup>5</sup> Third, consideration of the negligible "economic impact" of the federal restriction similarly supports the court of appeals ruling. Petitioners complain that "each bite of forage" constitutes a taking and they seek a total of ten dollars from the United States as "just compensation" (*ibid.*; see Pet. App. 3a).

Finally, petitioners' reliance (Pet. 13-14) on Section 4 of the Act, 16 U.S.C. 1334, which requires the Secretary to remove the animals from private property (within a reasonable time) at the landowners' request, is misplaced. Section 4 simply provides petitioners with a statutory right, enforceable in the courts, to have the Secretary remove the animals from their private property. The exclusive remedy for a violation of the statute is a court order directing the Secretary to remove the animals and the district court properly issued such an order in this case (Pet. App. 70a-72a). Section 4 does not, however, provide petitioners with an implied private right of action

---

<sup>5</sup> Under applicable state law, the United States would not be compelled to confine the horses or to prevent them from straying onto private, unfenced private property if the United States owned them as domestic livestock. See *Stillwell v. Nation*, 363 P.2d 916, 917-918 (Wyo. 1961). Hence, petitioners' reliance on state law to support their claim that the Association's loss of forage—a renewable resource—constitutes a taking of "property" is also misplaced. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *PruneYard Shopping Center v. Robins*, 447 U.S. at 87.

under the statute for damages or grant them a property right upon which they may base a constitutional claim for just compensation under the Fifth Amendment.

2. Petitioners also claim (Pet. 14-15) that this Court should grant review to determine whether the Property Clause empowers Congress to protect wild horses or burros on private lands. No such issue is properly before this Court in this case. All parties in the lower courts assumed that the Secretary had authority under the federal Act to restrict the harassment and killing of wild horses and burros on private lands. Petitioners claimed below only that such a restriction coupled with BLM mismanagement of the animals resulted in a taking for which the Association was constitutionally entitled to just compensation. Petitioners never claimed that the federal Act is in itself unconstitutional (which would raise questions not only under the Property Clause, but also under the Commerce Clause). As a result, the Property Clause issue was neither briefed by the parties nor ruled on by the lower courts. Hence, petitioners cannot raise it now in this Court for the first time. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

CHARLES FRIED

*Solicitor General*

F. HENRY HABICHT II

*Assistant Attorney General*

PETER R. STEENLAND, JR.

DONALD A. CARR

RAYMOND B. LUDWISZEWSKI

*Attorneys*

MARCH 1987



